

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.5796 OF 1985

For Approval & Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether reporters of local papers may be allowed to see the judgment ?
 2. To be referred to the reporters or not ?
 3. Whether their lordships wish to see the fair copy of the judgment ?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?
 5. Whether it is to be circulated to the Civil Judge?

NJ ZALA
VERSUS
THE STATE OF GUJARAT & ORS.

Appearance:

MR GM JOSHI for Petitioner
MR HH PATEL for Respondents No.1,2 & 3
None present for Respondent No.4

Coram: MR.JUSTICE S.K. Keshote,J
Date of decision:15/08/1999

C.A.V. JUDGMENT

#. The petitioner, a Supervisor in the photo registry wing of respondent No.2, filed this writ petition under Article 226 of the Constitution of India challenging thereunder the order dated 12.8.95, under which the

respondent No.4 was given promotion to the post of Junior Assistant Manager. He prayed for declaration that the petitioner is eligible and entitled for promotion to the post aforesaid. As usual, prayer has also been made for interim relief.

#. The respondent No.4, during the pendency of this Special Civil Application, has been confirmed on the said post. However, whatever orders passed of his confirmation etc. on the post are certainly subject to final decision of this Court in this Special Civil Application. The learned counsel for the petitioner has given out that the respondent No.4 has also been given promotion to the next higher post but as he did not want to go out of Ahmedabad, he has forgone that promotion and is continuing on this post for all these years. One more important fact has also been brought to the notice of this Court by the learned counsel for the parties that the respondent No.4 has already applied for voluntary retirement from services and he will retire from services on 13th September 1999.

#. Nobody is present on behalf of respondent No.4.

#. The learned counsel for the petitioner contended that though the petitioner was eligible for promotion to the post of Junior Assistant Manager, his case was not considered for promotion on the ground that he is not eligible for the same. The learned counsel for the petitioner contends that this is wholly a perverse approach of respondents as the petitioner is eligible for promotion to the post aforesaid. It is a case where right of consideration of petitioner for promotion to the post of Junior Assistant Manager has been denied and this action of respondents is clearly contrary to the provisions as contained under Articles 14 and 16 of the Constitution of India. Lastly, it is contended that respondent No.4 could not have been promoted as he was having adverse remarks in his service record. The criteria for promotion for the post of Junior Assistant Manager is proved merits and efficiency. When the adverse remarks were there, he could not have been taken to be fit for promotion to that post.

#. On the other hand, the learned counsel for respondents No.1, 2 and 3 contends that the petitioner was not having requisite experience as required for promotion to the post of Junior Assistant Manager and his case has rightly been not considered for promotion. So far as the attack on adjudging respondent No.4 suitable and eligible for promotion is concerned, the learned

counsel for respondents replied that adverse remarks were subsequently expunged.

#. Respective rival contentions raised by the learned counsel for the parties were given thoughtful consideration. I have perused the Special Civil Application as well as considered the subsequent pleadings which have been given by the parties.

#. It is not in dispute that in the service record of respondent No.4, adversity was there. However, the learned counsel for the parties have not produced on the record of this Special Civil Application, the material fact in this respect. When the petitioner challenges the legality, propriety and correctness of the action of the Departmental Promotion Committee adjudging the respondent No.4 to be suitable for promotion to the post of Junior Assistant Manager, heavy burden lies upon the petitioner to show that this decision is perverse. The learned counsel for the petitioner though raised contentions but has not substantiated the same by necessary factual foundation. The learned counsel for the petitioner does not dispute that the adverse remarks which were there in the service record of respondent No.4 have been expunged. His contention is that the same have been expunged after decision of the Departmental Promotion Committee, but he has not disclosed the facts on which date the adverse remarks were communicated to respondent No.4, when he filed representation against the same and when the reviewing authority decided his representation. In the absence of this factual foundation and in the absence of necessary factual facts given in this case in support of this contention, on this ground, promotion of respondent No.4 on the post of Junior Assistant Manager, cannot be taken to be illegal or perverse.

#. Now, I may advert to the other contentions raised by the learned counsel for the petitioner. Recruitment on the post of Junior Assistant Manager is regulated under the Gujarat Assistant Manager Government Photo Registry Recruitment Rules, 1985 (hereinafter referred to as "Rules, 1985"). These Rules are statutory rules as framed in exercise of powers confirmed by proviso to Article 309 of the Constitution of India by his Excellency the Governor of Gujarat. These Rules were published vide Notification dated 20th March, 1985. Under clause (a) of Rule 2 of the Rules, 1985, promotion is one of the source of recruitment to the post of Junior Assistant Manager. This rule reads that, "by promotion of a person of proved merit and efficiency from amongst Supervisor or Foreman who have served for five years as

such". So a Supervisor or a Foreman who has five years' experience is eligible for promotion to the post of Junior Assistant Manager as per the Rules, 1985, published vide Notification dated 20th March, 1985, but these Rules were amended and the amended rules were published by Notification dated 31st July, 1985. These amended rules provide that for eligibility for promotion to the post aforesaid, Supervisor should have three years' experience and Foreman should have five years' experience. The learned counsel for the petitioner does not dispute that on the day on which the respondent No.4 was promoted, the petitioner was not having five years' experience as a Supervisor. However, he contends that he was having three years' experience but still he was considered to be ineligible for promotion.

#. Few facts are to be taken for appreciation of these contentions. The petitioner was promoted to the post of Head Clerk on 9.4.82. The pay-scale for the post of Head Clerk was Rs.425-800 at the relevant time whereas the pay-scale for the post of Supervisor was Rs.380-560.. The petitioner had objected against his promotion as Head Clerk and his objection was ultimately found to be correct and accordingly he was ordered to be promoted as Supervisor under the order dated 9.7.83. If we count experience of the petitioner on the post of Supervisor from 5.7.83, certainly on the date on which promotion of respondent No.4 has been made, he was not having three years' experience on the post but the respondents have considered the petitioner to be Supervisor with effect from 5.4.82 from which date he came to be promoted on the post of Head Clerk. Not only this, his salary has also been fixed in the pay-scale of Supervisor from the said date. So the respondents have taken to the petitioner to be Supervisor from 7.4.82 and his pay has also been reduced, meaning thereby, there would have been recovery from his salary but when the question of consideration of his case for promotion has come, he was taken to be Supervisor only from 4.7.83. It is a case where the respondents No.1, 2 and 3 have tried to get benefit of their own wrong against the petitioner in favour of respondent No.4.

##. During the course of arguments, the learned counsel for the petitioner has tried to give out that all these things have been done deliberately to extend benefits of favouritism to respondent No.4. Though I do not consider it to be necessary to go on this larger issue but from the facts which have come on the record, there appears that the respondents may have acted in this manner so that the petitioner may not create any hurdle in the

smooth reaching of respondent No.4 to the post of Junior Assistant Manager by promotion. Once the respondents have accepted the petitioner to be Supervisor from 9.4.82, then for all the purposes he should have been treated as Supervisor from that date and his experience as Supervisor should have been taken from that date.

##. The learned counsel for the respondents does not dispute that in case the experience of the petitioner as Supervisor is counted from 9.4.82, he was eligible for consideration for promotion to the post of Junior Assistant Manager on the date on which the respondent No.4 was given promotion. The grievance of the petitioner that he has wrongly been taken to be ineligible for promotion deserves to be accepted and it is hereby declared that the petitioner was eligible for promotion to the post of Junior Assistant Manager on the date on which the respondent No.4 was promoted to the above post.

##. The respondents have not taken into consideration the correct rules. It is really shocking that the respondents have altogether ignored the amendment which has been made in the rules much earlier to the date on which the respondent No.4 was promoted.

##. Now the question which falls for consideration of this Court is what relief has to be granted to the petitioner. The petitioner has been denied of the right of consideration for promotion as conferred to him under Article 14 and 16 of the Constitution of India. It is true that the petitioner has no right of promotion but the learned counsel for the petitioner submits that he has a meritorious record and in comparison with respondent No.4, he could have been certainly adjudged suitable for promotion in case his case would have been considered for the same. However, in view of the fact that the respondent No.4 is working on the post for last more than 14 years and he has already submitted application for voluntary retirement and is going to voluntary retire from 30th September 1999, I do not consider it to be a fit case where his promotion has to be quashed and set aside. Moreover, it is not fault of respondent No.4. His case has been considered and may be as there was no competition, as a matter of chance, he could have got promotion but he worked for all these years on this post. At this juncture, when he has already given his application for voluntary retirement, this promotion, if quashed, will have serious repercussions and he may suffer manifold monetary losses. Otherwise also, on the principle of pay for work, it may

not be advisable, desirable or reasonable to direct for recovery of different of amount of the salary paid to him for all these years. As a consequence of quashing of his promotion, he may also suffer in his retirementary benefits. Not only this, this Court cannot give promotion to the petitioner. The Court can give only directions to the respondents to consider the case of the petitioner for promotion. Now in the service record of respondent No.4, there is no adversity. The case of petitioner has to be considered for promotion from the date on which the respondent No.4 was given promotion and there may be all possibility of his being adjudged suitable for promotion. There may also be possibility that respondent No.4 be adjudged suitable in case of reconsideration of his case for promotion. Keeping in view all these broad aspects of the matter and possible decision of the respondents either way, I do not consider it to be a fit case where the promotion given to respondent No.4 has to be quashed.

##. In the result, this Special Civil Application is disposed of in the terms that the petitioner is declared to be eligible for promotion to the post of Junior Assistant Manager on the date on which the respondent No.4's case was considered for promotion and he was given promotion. The respondents No.1,2 and 3 are directed to consider the case of the petitioner for promotion to the post of Junior Assistant Manager with effect from the date on which the respondent No.4 has been promoted. The case of petitioner has to be considered only after retirement of respondent No.4. In case the petitioner is adjudged suitable for promotion after considering his case in accordance with Rules 1985 (as amended), he shall be entitled for all consequential benefits following therefrom. However, the promotion of respondent No.4 will not be affected in any manner nor the respondents will pass any order adverse to him of reversion or recovery of the difference of salary paid to him. The case of petitioner has to be considered for promotion and finalisation thereof within a period of two months of the retirement of the respondent No.4. In case he is found suitable for promotion, all the consequential benefits are to be to him within a period of one month next. Rule is made absolute in aforesaid terms with no order as to costs.